Supreme Court, U.S.
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No. 97-796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

YAVAPAI-PRESCOTT INDIAN TRIBE,

Petitioner,

vs.

HAROLD SCOTT, in his official capacity as Director of the Arizona Department of Revenue; TONY WEST, in his official capacity as Treasurer of the State of Arizona; and PRESCOTT CONVENTION CENTER, INC., an Arizona corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. THE RECORD REFUTES THE STATE'S ASSERTION THAT "NEW ARGUMENTS" ARE RAISED BY THE TRIBE'S PETITION FOR A WRIT OF CERTIORARI.

Rather than answer the Tribe's Petition with a substantive argument, respondents have accused the Tribe of raising a "new" claim in its Petition. (Resp. Brief at 4-5.) To the contrary, the argument that the Taxes are preempted because services are discriminatorily withheld from the reservation was argued exhaustively below.

In their Brief in Opposition, respondents have *not* denied that the Hotel – which they tax like any non-Reservation business – is refused state services solely *because* it is situated on an Indian Reservation. As a matter of well-established law (that is, until the Ninth Circuit's majority opinion here), such a practice violates the rule that a State tax can lawfully burden tribal development only if "narrowly tailored" to serve "legitimate" state interests, which are aimed at providing services to on-Reservation activities. *See, e.g., Crow Tribe of Indians v. Montana*, 819 F.2d 895, 900-02 (9th Cir. 1987), *summarily aff'd*, 484 U.S. 997 (1988); *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1412 (9th Cir. 1992). That claim was fully briefed, argued and addressed by the court below, and the dissent adopted the Tribe's argument on point. (App. 26.) That claim – and no other – now forms the first question presented for review in the Tribe's Petition.

In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) – a case on which respondents relied heavily below – this Court held that "[u]nder current doctrine . . .

a State can impose a *nondiscriminatory* tax on private parties with whom the United States or an Indian Tribe does business, even though the financial burden of the tax may fall on the United States or a tribe." 490 U.S. at 175 (emphasis added). As the Tribe noted in its Petition, the "nondiscriminatory" requirement in *Cotton Petroleum* and the Ninth Circuit's "narrowly tailored" requirement applied different labels to the same concept – that a state-imposed burden on tribal development must not unfairly disadvantage the tribe. That claim was presented to both the district court and the Ninth Circuit, and it is properly before this Court.

Respondents attempt to avoid the applicability of the "narrowly tailored" or "nondiscriminatory" requirement by arguing that only taxes levied directly on a tribe are subject to those basic fairness concerns. In their Brief in Opposition, respondents wrongly assert that

> " . . . the narrowly tailored requirement is only triggered when the tax is effectively a tax on the tribe itself. . . [I]t makes sense that a tax on a tribe will be upheld only if connected to services provided to the tribe or tribal members."

(Resp. Brief at 7.) That argument demonstrates the faulty reasoning that led the Ninth Circuit to abandon the "narrowly tailored" test and the doctrinal confusion that warrants issuance of a writ of certiorari in this case.

Contrary to respondents' assertion, this Court has held that the preemption balancing applies *only* when a state tax is imposed on non-Indians doing business on an

Indian reservation. Indeed, nothing short of an act of Congress can justify the imposition of a state tax on an Indian tribe:

> [W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, *rather than on non-Indians*, we have employed, instead of a balancing inquiry, "a more categorical approach: '[A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, *a State is without power to tax reservation lands and reservation Indians.*"

Oklahoma Tax Com'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) (citation omitted) (emphasis added).

Where, as here, a state taxes the revenues of a federally-funded, tribally-owned economic development project, yet consciously refuses to provide essential services that off-Reservation neighbors receive less than a mile away, the taxes cannot survive preemption.

II. RESPONDENTS' CONTENTION THAT THE TRIBE HAS "MISSTATED" THE RECORD IS ERRONEOUS.

Respondents charge the Tribe with misstating the record by arguing that the Hotel does not receive the basic services that its off-Reservation neighbors receive. The record is clear, and the Tribe presented it fairly and accurately. Though state-funded agencies do provide fire, law enforcement and emergency medical services on the Reservation, they do so *only in exchange for separate fees that the Tribe pays in addition to taxes levied on the Hotel.* (App. 25.) Businesses located less than a mile away

off-Reservation are *not* required to pay separate fees to fund the same government services. As the payor of those fees, it is the Tribe – not the State – that provides the services to the Reservation. For respondents to argue otherwise – and to accuse the Tribe of misstating the record in the process – is wholly improper.

CONCLUSION

For the foregoing reasons, and the reasons advanced in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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